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No. 132

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Supreme Court of the United States,

OCTOBER TERM 1929—NO.

ANNA URAVIC, as Administratrix of the Goods, Chattels and Credits which were of Anton Uravic, deceased,

Petitioner,

—against—

F. JARKA COMPANY, INC., and UNITED AMERICAN LINE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR KINGS COUNTY, AND BRIEF IN SUPPORT THEREOF.

VERNON S. JONES,
Counsel for Petitioner.

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Petitioner,

—against—

F. JARKA COMPANY, INC., and UNITED AMERICAN LINE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR KINGS COUNTY.

The petitioner, Anna Uravic, as administratrix, prays that a writ of certiorari issue to review a final judgment of the Court of Appeals of the State of New York, entered on October 22nd, 1929, affirming a judgment of the Supreme Court of the State of New York dismissing the complaint in the action.

Following the judgment of the Court of Appeals and pursuant to an order of that Court, the record and the proceedings in the Court of Appeals were remitted to the Supreme Court of the State of New York for the County of Kings, where the judgment of the Court of Appeals was made the judgment of the Supreme Court. The order remitting the record appears at folios 299-300 of the record.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 22nd, 1929.

The jurisdiction of the Court is provided by Section 344 (b) of Title 28 of the United States Code.

Opinions Below.

The Court of Appeals wrote no opinion. However, in affirming, it did so "on the authority of *Resigno* v. *F. Jarka Co., Inc.*, 246 N. Y. 537". The correct citation for that case is 248 N. Y. 225.

The judgment of the Court of Appeals appears at page 99 of the record. The decision is reported in 252 N. Y. 24 (memorandum in advance sheets).

The trial Court wrote no opinion. However, on the trial, there was extended oral argument between the Court and trial counsel, which shows that the dismissal was on a ground involving a Federal question. The argument on the dismissal appears at pages 67-70 of the record.

The Questions Presented.

1. Whether Section 33 of the Merchant Marine Act of June 5th, 1920, commonly referred to as the Jones Act, applies in an action between a plaintiff who is the personal representative of a deceased American longshoreman and a defendant which is an American stevedoring company, and was the employer of the plaintiff's intestate, where the longshoreman was killed through the negligence of the defendant or of its employees while he was working on a vessel of foreign registry lying at the time in navi-

gable waters of the United States, there being no privity of contract between the plaintiff's intestate and the owner of the vessel. In other words, does the happening of the accident on a foreign vessel mean that it happens on foreign territory?

2. If so, has the Jones Act any extra-territorial application?

3. Can both these questions be answered by a decision that Congress in passing the Jones Act, was regulating an American master and servant relationship irrespective of vessels or their nationality?

Statement of Facts.

The action was brought originally against two defendants.

It was discontinued as to one of them at the beginning of the trial and proceeded to trial against the other defendant, F. Jarka Company, Inc. (fol. 69).

The plaintiff's intestate, on June 13th, 1926, was employed by F. Jarka Company, Inc., the defendant, an American corporation engaged in the business of loading and unloading steamships (fols. 76, 27-28, 72, 18). Pursuant to such employment he was assisting as a longshoreman in the unloading of the steamship "Hamburg", which at the time was in the navigable waters of New York Harbor (fols. 96, 20, 103).

Plaintiff's intestate was an American citizen (fol. 73). Defendant was a Delaware corporation (fol. 72). The steamship "Hamburg" was a vessel of German registry (fol. 70).

It was conceded that the plaintiff's intestate died on July 13th, 1926, as a result of injuries received on the same day on board the steamship "Hamburg" (fol. 73).

There was introduced on the trial, evidence from which a jury could have found that the plaintiff's intestate was caused to die by the negligence of defendant, F. Jarka Company, Inc., or the negligence of its employees.

Plaintiff relied on Section 33 of the Merchant Marine Act of 1920 as interpreted by the decision of this Court in *Haverty* v. *International Stevedoring Company*, 272 U. S. 50, and claimed that this statute made the defendant liable (fols. 70, 201-202).

At the close of plaintiff's evidence, the defendant moved to dismiss "upon the ground it appears affirmatively that the negligence was the negligence of a fellow-employee of the plaintiff for which this defendant is not responsible" (fol. 201).

The trial Court after argument and consideration of the effect of *Haverty* v. *International Stevedoring Company*, 272 U. S. 50, held that Section 33 of the Merchant Marine Act of 1920 (Jones Act) did not apply to the case at bar because the accident happened on a vessel of foreign registry (fols. 206-207).

The complaint was thereupon dismissed. An exception was taken to the Court's ruling (fol. 209).

Thereafter, on appeal to the Appellate Division of the Supreme Court from the judgment entered on the dismissal of the complaint, the judgment was affirmed (fols. 253-257).

Thereafter, on appeal, by permission, to the Court of Appeals, the judgment of the Appellate Division of the

Supreme Court was affirmed on the authority of the case of "*Resigno* v. *F. Jarka Co., Inc.,* 246 N. Y. 537" (fols. 295-300). The correct citation for this case is 248 N. Y. 225.

A copy of the decision of the Court of Appeals, together with the dissenting opinion (which, however, concurred in the result), in the case of *Resigno* v. *F. Jarka Co., Inc.,* 248 N. Y. 225, may be found in the appendix of this petition.

It is apparent that the decision of the Court of Appeals in the *Resigno* case, because of which decision the judgment in the case at bar was affirmed, was based upon an interpretation of Section 33 of the Merchant Marine Act of 1920 and the case of *International Stevedoring Company* v. *Haverty,* 272 U. S. 50. It is asserted by the petitioner that the interpretation made by the Court of Appeals in the *Resigno* case and relied on for the affirmance of the judgment in the case at bar is erroneous.

Briefly, the Court of Appeals held the following:

That seamen employed as members of the crew of foreign vessels are not within the purview of Section 33 of the Merchant Marine Act of 1920; that the effect of *International Stevedoring Company* v. *Haverty,* 272 U. S. 50, was merely to put stevedores upon the same footing as members of the crew for the purpose of applying the statutory remedy and that since a member of the crew of a foreign vessel could not recover under the Merchant Marine Act for an injury occurring to him while the vessel was in the navigable waters of the United States, a longshoreman could not do so.

The dissenting opinion of Crane, *J.*, held that even if the Merchant Marine Act does not apply to members of the crews of foreign vessels while in territorial waters, American longshoremen are within the scope of the act even when working on ships of foreign registry. As Judge Crane said:

> "A longshoreman, now classed as an American seaman, does not lose the benefits of this act because he happens to be working for a few hours upon a German instead of an American ship."
>
> *Resigno* v. *F. Jarka Co., Inc.*, 248 N. Y. 225, at 242.

Reasons for Granting the Writ.

1. The Court of Appeals has interpreted an Act of Congress in such a manner as to divide American longshoremen into two classes so far as their right to recover from their employers for personal injuries is concerned, viz.: those working at the time of injury on American ships and those working at the time of injury on foreign ships. Such an interpretation of an Act of Congress is not conducive to the preservation of the uniformity of the Maritime Law.

2. The decision of the Court of Appeals, although it affects immediately longshoremen only, is based on a decision of a point which has already been before the Supreme Court of the United States in the case of *Plamals* v. *S. S. Pinar Del Rio*, 277 U. S. 151, but not decided, namely: whether a member of the crew of a foreign vessel injured while the vessel is in the navigable waters of the United States may have the benefits of Section 33 of the Merchant Marine Act of 1920.

3. The matters in dispute are of vital concern to numbers of longshoremen having similar claims.

4. There is a conflict between the decisions of the Court of Appeals of the State of New York and decisions of the United States District Court for the Eastern District of New York, of the United States District Court for the Southern District of Texas, of the United States District Court for the District of Oregon and of the Supreme Court of the State of Washington. The citations of these cases appear in the brief accompanying this petition.

Respectfully submitted,

ANNA URAVIC,
As Administratrix.

By VERNON S. JONES,
Attorney of Record.

Dated, New York, January 16, 1930.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

VERNON S. JONES.

Supreme Court of the United States.

OCTOBER TERM 1929—NO.

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Petitioner,

—against—

F. JARKA COMPANY, INC., and UNITED AMERICAN LINE, INC.,

Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

A reference has been made in the petition to the jurisdictional provisions, proceedings and opinions below. The facts in the case are stated in the petition.

The general proposition for which the petitioner contends is that longshoremen employed by American stevedoring companies are entitled to the benefits of Section 33 of the Merchant Marine Act of 1920 when injured on vessels of foreign registry lying within the navigable waters of the United States.

If the petitioner is right, the highest Court of New York State has denied to her a right conferred by a statute of the United States.

It is not necessary to contend and the petitioner does not contend that Section 33 of the Merchant Marine Act of 1920 applies to the members of the crews of foreign

vessels who may be injured while the vessels are in American waters.

A. *Neither the Merchant Marine Act itself nor the decision of this Court which interprets it indicates that the right of a longshoreman to recover against his employer is dependent on the registry of the vessel on which the accident takes place.*

The right of a longshoreman to recover damages against his employer on account of injuries caused by the negligence of a fellow-employee depends upon Section 33 of the Merchant Marine Act of 1920 as interpreted by the case of *International Stevedoring Company* v. *Haverty*, 272 U. S. 50.

The statute itself does not expressly make the liability of the employer depend upon the happening of the accident on a vessel. It provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

With regard to longshoremen, however, this Court has held:

> "* * * that in this statute, seaman is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was."
>
> *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, at 52.

It is not clear whether the Court meant to limit the benefits of the Merchant Marine Act to longshoremen injured on navigable waters or meant to indicate that the act was applicable "at least" to such employees. However, there is no limitation in the opinion having reference to the registry of the vessel on which the longshoreman is employed.

B. *Section 33 of the Merchant Marine Act of 1920 is designed to affect the relationship of employer and employee. It does not affect vessels as such.*

The Court of Appeals has reached its conclusion because of assumptions which, the petitioner submits, are erroneous. That Court has assumed that Section 33 of the Merchant Marine Act does not apply to members of the crew of a foreign vessel because, where they are concerned, the locus of the tort is a foreign vessel and because the act was not meant to apply to any but American vessels. From this it deduces a similar law for longshoremen.

However, Section 33 of the Merchant Marine Act makes no reference to vessels at all. It refers only to seamen and their employers and is designed to govern the master and servant relationship wherever that relationship comes within the presumptive intention of Congress.

If the Merchant Marine Act of 1920 does not apply to the members of the crew of a foreign vessel it is because Congress did not intend to legislate with regard to a relationship of master and servant which is based on a contract of employment ordinarily made under the laws of a foreign country and which exists within the United States only transiently. Although Congress, no doubt, has the power to do so, it may well be doubted that Congress did intend to affect an essentially foreign relationship with legislation of such importance where the statute contains no specific words to that effect.

However, with regard to American longshoremen, whose contracts of employment are made and whose work is performed only in the United States, it is submitted that there arises no problem involving foreign interests if the statute is applied to them as a *class* whether they are working on vessels of United States or foreign registry.

As Judge Crane said in his dissenting opinion in *Resigno* v. *F. Jarka Co., Inc.*, 248 N. Y. 225, at 240:

> "This class of specialized workers connected with maritime service is to be covered by the act of 1920 and included within its provisions; not merely those few members of the class who happen for the time being to be working upon American ships. Stevedores and longshoremen would receive very little benefit from this act of Congress were it so limited. Unless the act has this general application, a shift of a gang of longshoremen from a ship on one side of a dock to a ship on the other side, might also shift the law of responsibility. Did Congress intend to make the law of responsibility for this *class* of workmen, or did it intend to leave it to these toilers by hand to select that law? The question must answer itself."

C. In the following cases it has been held that Section 33 of the Merchant Marine Act of 1920 is applicable in a case of a longshoreman injured on a foreign vessel in domestic waters:

Zarowitch v. *F. Jarka Co., Inc.*, 21 Fed. Rep. 2nd, 187, United States District Court for the Eastern District of New York;

Mahoney v. *International Elevating Co., Inc.*, 23 Fed. Rep. 2nd, 130, United States District Court for the Eastern District of New York;

Williams v. *Oceanic Stevedoring Company*, 27 Fed. Rep. 2nd, 905, United States District Court for the Southern District of Texas;

Peterson v. *Independent Stevedore Company*, United States District Court, District of Oregon, March 18th, 1929; not yet reported in Fed. Rep. but found in 1929 American Maritime Cases 629;

Philip McGinn v. *North Coast Stevedoring Company*, 149 Wash. 1, Supreme Court of the State of Washington;

Gustav Ranstrom v. *International Stevedoring Company*, Supreme Court of the State of Washington, May 27, 1929, not yet reported in State Reporter but found in 277 Pac. 992.

So far as known, New York is the only jurisdiction in which a contrary rule has been laid down and this applies only to the State courts. However, on account of the importance of New York as a maritime center, the ruling of its highest Court is far-reaching in effect.

Conclusion.

There are many claims of longshoremen injured prior to the passage of the Longshoremen's and Harbor Worker's Compensation Act of 1927 which are awaiting a final decision of the question involved in this petition. One of them is now awaiting decision in the United States District Court for the Southern District of New York. This is the case of *William O'Reilly* v. *Cunard S. S. Co.*

The passage of the Longshoremen's and Harbor Worker's Compensation Act of 1927 has not changed the situation essentially. That Act also governs the relationship of master and servant. The same question of its application to a longshoreman injured on a foreign ship in territorial waters is sure to be raised. Just as in the present case, the statute itself is silent on the point and it has not been decided judicially. However, the decisions of the New York Court of Appeals in *Resigno* v. *F. Jarka Co., Inc.*, 248 N. Y. 225, and in the case at bar would certainly be persuasive precedents for holding that the compensation act does not apply to longshoremen working on vessels of foreign registry situated within the navigable waters of the United States.

The importance of the present case, linked as it is with the more important one of a Federal compensation law, is at once evident.

Review by certiorari should be allowed.

Respectfully submitted,

VERNON S. JONES,
Counsel for Petitioner.

Appendix.

248 N. Y. 225, 162 N. E. 13.

Resigno v. F. Jarka Co., Inc., et al.

Court of Appeals of New York. May 29, 1928.

CARDOZO, *C. J.*—Plaintiff, an administrator, brings this action against F. Jarka Co., Inc., a corporation carrying on the business of master stevedores, to recover damages for the death of Anthony Resigno, his son. Anthony Resigno, a stevedore employed by the defendant, was working, when his injuries were suffered, on the steamship *Hannover* in navigable waters at Hoboken, N. J. The steamship *Hannover* is owned by the North German Lloyd, and flies the flag of Germany. Plaintiff alleges that the Jarka Company, the employer, was negligent in omitting to provide his son with a safe place of work and with competent fellow-servants as well as in other particulars. The employer moves to dismiss the complaint under Civil Practice Rule 107, subdivision 2, upon the ground that the Workmen's Compensation Act of New Jersey (Laws N. J. 1911, p. 134, as amended by Laws N. J. 1913, p. 302) supplies an exclusive remedy. The plaintiff founds his right of action, first, upon the act of Congress, commonly known as the Jones Act (Act of June 5, 1920, 41 Stat. C. 250, pp. 988, 1007, § 33), and, if that be deemed inapplicable, upon a statute of New Jersey, adopted in 1848, awarding the remedy of damages where negligence results in death.

(1) "Any seaman who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain any action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 3 Mason's U. S. Code, p. 3273, § 688 (46 USCA § 688).

The foregoing section (33) is part of a statute entitled "An act to provide for the promotion and maintenance of the American Merchant Marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes." 41 Stat. 988. Another section (39 [46 USCA § 889]) is to the effect that the act "may be cited as the Merchant Marine Act 1920."

Section 33, above quoted, is an amendment of section 20 of an act of March 4, 1915 (38 Stat. c. 153, p. 1164; Panama R. R. Co. v. Johnson, 264 U. S. 375, 389, 44 S. Ct. 391, 68 L. Ed. 748). The act last mentioned is entitled "An act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea." It amends divers provisions of the United States

Revised Statutes, some of which are again amended by the act of 1920, and also divers provisions of the act of December 21, 1898, entitled "An act to amend the laws relating to American Seamen, for the protection of such seamen, and to promote commerce." It includes a new section, numbered 20 (the parent of the present section 33) which provides:

> "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

We hold that section 33 of the Merchant Marine Act of 1920, like its parent, section 20 of the act of 1915, is to be limited to seamen at work upon domestic vessels. We do not doubt the power of Congress to give a broader remedy. Irrespective of the nationality of the vessel, the remedy may be extended to any one who is injured within the territory of our waters. We are unable to convince ourselves that the power has been exercised. The section now before us is to be read in the setting of other acts and sections. So read, it is not susceptible of extension to any vessels but our own. As to these, it applies both at home and on the seas. At home and on the seas they are subject to the power of our government. No such range of power exists in respect of foreign vessels. Power as to these is territorial and local. Congress did not intend to give a remedy for injuries suffered on the high seas aboard a vessel of another flag. Jackson v. Archimedes (Jan. 3, 1928) 275 U. S. 463, 48 S. Ct. 164, 72 L. Ed. —; American Banana Co. v. United Fruit Co., 213 U. S.

347, 357, 29 S. Ct. 511, 53 L. Ed, 826, 16 Ann. Cas. 1047. We see no token of an intention to change the class of vessels with changes of locality. The act, when read in its setting, is true to its title, wherein its primary purpose is defined as the promotion and maintenance of the American Merchant Marine. Cf. Patterson v. The Eudora, 190 U. S. 169, 172, 23 S. Ct. 821, 47 L. Ed. 1002. It is not to be extended by words of general application to shipping not our own. Cf. The Pinar Del Rio (C. C. A.) 16 F. (2d) 984; affirmed by the United States Supreme Court May 14, 1928, 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed.—, without passing on this question; The Falco (C. C. A.) 20 F. (2d) 362, 364.

A reading of related sections reinforces this conclusion. When foreign vessels are brought within the range of their prohibition, the extension is expressed. There is no resort to doubtful inference. This is true of the Revised Statutes. See, e. g., §§ 4510, 4530, 4607, 4612 (46 USCA §§ 562, 597, 709, 713); The Elswick Tower (D. C.) 241 F. 706. It is true of the act of 1915. See, e. g., sections 14, 16 (22 USCA § 258; 46 USCA § 222). It is true of the act of 1920. See, e. g., section 30, subsection P. (46 USCA § 971); sections 31, 32, 34 (46 USCA §§ 597, 599). Section 31 makes provision for the payment of part of the wages earned by seamen on board a vessel of the United States at ports where the vessel arrives. There is express statement that "this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." The debates in the Congressional Record quoted in the briefs of counsel have

relation to this section. They do not touch the case at hand. Section 32 makes it unlawful to pay wages in advance. Again there is provision that the section shall apply to foreign vessels in our waters. Jackson v. Archimedes, supra. Next in order is section 33, the one before us for construction; it significantly omits an equivalent extension. "A few words would have stated that intention, not leaving such an important regulation to be gathered from implication." Jackson v. Archimedes, supra, quoting Sandberg v. McDonald, 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 200. Congress had no difficulty in making its meaning plain when extension was desired. Its silence is the more telling when contrasted with its utterance.

Another signpost of intention is yet to be considered. As if to clinch the meaning, the chapter of the United States Code embodying the statutes in respect of merchant seamen ends with a section which has the label "Definitions". "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'." U. S. Code, § 713, c. 18, title 46; formerly U. S. R. S. § 4612. We cannot read this provision except as a statement that the intention of the Congress is to deal with domestic vessels and with those who work aboard them. The Elswick Tower, supra, and cases there cited. We do not ignore the plaintiff's argument that section 713 of the United States Code, being substantially a re-enactment of United States Revised Statutes, section 4612, is to be limited

to those sections of the chapter which were contained in the Revised Statutes before they were gathered into the Code. Cf. Mason's U. S. Code, vol. 1, p. 1 (1 to 4 USCA, p. 3). Of these, the present section (section 33 of the act of 1920, now section 688 of the Code) is not one. Even if this be so, the definition has significance. The act of 1920 did amend many provisions of the Revised Statutes, as also did its parent, the act of 1915. The provisions so amended are cognate in spirit and effect to the section now before us. We impute to Congress a willingness to mask its true intentions if we say that the acts of 1915 and 1920 were framed throughout their main provisions in subjection to the statutory definitions of "master" and "seaman", but that a single section was expected without hint of such a purpose to bear a broader meaning. The conclusion is unreasonable that the lawmakers, designing an extension, would have left us thus to struggle with silence and obscurity. A new basis of liability, a new principle of jurisdiction, will not be held to have been interjected without warning or by uncertain implication. If considerations of convenience or policy can be marshalled in aid of a contrary conclusion, there are none of them so clear and unequivocal as to have controlling value. The development of our merchant marine requires, it is said, that foreign and domestic owners compete on a basis of equality. Equality is impracticable in respect of this provision, however we construe it, for jurisdiction is lacking to define the law of remedies for foreign vessels on the seas. In the long run, the development of our merchant marine may be fostered rather than impeded by holding out to seamen employed upon our ships the inducement

of a protection withheld by our competitors. The appraisal of such tendencies is matter for the lawmakers. "That which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole." Holmes, *J.*, in Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 100, 48 S. Ct. 100, 105, 72 L. Ed. —. We see no reason for a departure from the definitions of a glossary embodied in related statutes and framed for the very purpose of helping to stabilize construction.

The court is unanimous in its holding that seamen in the strict or proper sense are without the purview of the act when working upon foreign vessels. Whatever division there is among us has its origin in a supposed distinction between the remedy available to such seamen and that available to stevedores. The suggestion is that, in cases of the latter order, the nationality of the vessel is to be rejected as a test. The judgment of the court is that the test does not vary with the nature of the service. Under the ruling of the Supreme Court (International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157), a stevedore is in as good a position as if he were a seaman proper. We are unable to satisfy ourselves that under that decision, or by force of any consequences legitimately flowing from it, his position is even better. The fact is recalled to us in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, that in bygone days the work of loading and unloading was done by members of the crew. We think the effect of International Stevedoring Co. v. Haverty is merely to put a stevedore on

the same footing as the crew for the purpose of applying the statutory remedy. True, indeed, it is that the remedies available to a stevedore may thus vary from day to day, and even from hour to hour, with the location of his labor. Distinctions of that order are not unknown to the law. They have been made familiar by rulings under the Workmen's Compensation Acts (Consol. Laws, c. 67) by which a longshoreman is given a remedy if working on a boat and denied the same remedy if working on a dock. State Industrial Commission of State of New York v. Nordenholt Corporation, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013. So under the Employers' Liability Act (45 USCA §§ 51-59; U. S. Comp. St. §§ 8657-8665) of Congress. The servant gains a remedy or loses one according to the particular service he is rendering at the very moment of the injury. Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941. The incongruity is no greater here. Congress did not mean that, if a stevedore and a member of a crew were injured on the same vessel as a result of the same casualty, the stevedore should have a remedy and the seaman none. The act was intended to apply to both or neither.

(2) The federal act failing, there remains the statute of New Jersey which gives a cause of action for damages to appointed representatives where negligence results in death.

The Appellate Division held that the remedy under that act had been supplanted by the adoption in New Jersey of a Workmen's Compensation Act, awarding the usual system of insurance to workmen subject to its provisions. We think the holding is erroneous.

Resigno was injured while engaged in maritime work upon navigable waters. There was no power in the Legislature of New Jersey to substitute a system of workmen's compensation for the right of action for damages that was his under maritime law. There was a like defect of power to substitute such a system for the then existing right of action for the use of his survivors. The point was expressly ruled in Warren v. Morse Dry Dock & Repair Co., 235 N. Y. 445, 139 N. E. 569; Id., 262 U. S. 756, 43 S. Ct. 703, 67 L. Ed. 1217; cf. Western Fuel Co. v. Garcia, 257 U. S. 233, 240, 42 S. Ct. 89, 66 L. Ed. 210; Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918 C, 451, Ann. Cas. 1917 E, 900; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145; Washington v. W. C. Dawson & Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646. A different question would be here if the Legislature had attempted to repeal the death statute altogether. What it attempted was "not to abolish every remedy, but to substitute one remedy for another." Warren v. Morse Dry Dock & Repair Co., supra. "To the extent that the substitution of a new remedy is ineffective, the old one survives."

Since the wrong was done upon the waters, the circumstance is unimportant that the death which followed was upon the land. Kursa v. Overseas Shipping Co., 217 App. Div. 775, 217 N. Y. S. 194; U. S. Shipping Board Emergency Fleet Corporation v. Greenwald (C. C. A.) 16 F. (2d) 948.

The judgment of the Appellate Division and that of the Special Term should be reversed, and the motion denied with costs in all courts.

CRANE, *J.* (concurring in result)—A motion was made by the defendant, F. Jarka Company, Inc., under rule 107, subdivision 2, of the Rules of Practice, for judgment on the pleading dismissing the complaint upon the ground that the court did not have jurisdiction of the subject of the action. The motion was granted, and the judgment of dismissal has been affirmed by the Appellate Division, one of the justices dissenting.

The complaint alleges that the defendant, F. Jarka Company, Inc., is and was a foreign corporation duly organized and existing under the laws of the state of New Jersey, maintaining an office for the regular transaction of business as stevedore in the borough of Manhattan, city and state of New York. Further allegations set forth that F. Jarka Company, Inc., under contract and agreement with the defendant, the North German Lloyd, was engaged in loading and discharging a cargo upon and from the steamship Hannover, lying afloat in navigable waters at a pier at the foot of Sixth street, city of Hoboken, state of New Jersey. The plaintiff's intestate, Anthony Resigno, was in the employ of F. Jarka Company, Inc., as a longshoreman loading and unloading the ship. The complaint then goes on to allege negligence upon the part of the employer toward this employee, which resulted in his death. It is said that the master failed to provide him with a safe place to work, to furnish him competent fellow servants; failed to warn him of latent and unknown dangers, or to properly instruct him in the performance of his duties—a common-law cause of action by a servant against his master. The facts of the accident are alleged, followed by a copy of the law of New Jersey, approved March 3, 1848 (P. L. p. 151), entitled, "An act to provide for the recovery of damages where the death of a person is

caused by wrongful act, neglect or default," the damages being recoverable by the representative of the deceased for the benefit of the widow and next of kin.

The courts of this state had jurisdiction of this cause of action, irrespective of federal statutes, and the complaint should not have been dismissed.

The Workmen's Compensation Law of New Jersey did not apply to the case, as the cause of action arose upon the navigable waters of the United States. Danielson v. Morse Dry Dock & Repair Co., 235 N. Y. 439, 139 N. E. 567; Id., 262 U. S. 756, 43 S. Ct. 703, 67 L. Ed. 1217; Washington v. W. C. Dawson & Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646. The fact that Anthony Resigno died on land does not change the admiralty nature of the tort. Kursa v. Overseas Shipping Co., 217 App. Div. 775, 217 N. Y. S. 194; The Chiswick (C. C. A.) 231 F. 452; The Anglo-Patagonian (C. C. A.) 235 F. 92; U. S. Shipping Board Emergency Fleet Corporation v. Greenwald (1927 C. C. A. 2) 16 F. (2d) 948; Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye, 207 F. 247, 253 (1913 C. C. A. 5).

As the Workmen's Compensation Act did not apply, an action could be maintained under the New Jersey death statute (2 Comp. St. 1910, p. 1907) for common-law negligence causing death where the tort was committed upon navigable waters, and the state courts would have jurisdiction of the cause. Warren v. Morse Dry Dock & Repair Co., 235 N. Y. 445, 139 N. E. 569; Western Fuel Co. v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210; Kursa v. Overseas Shipping Co., supra.

This complaint, therefore, stated a cause of action for common-law negligence resulting in death for which the New Jersey statute gave a right of action to the rep-

resentatives for the benefit of the widow and next of kin of the deceased. Such a cause of action could be maintained in the Supreme Court of New York state, as it had jurisdiction of the parties. For this reason, if no other, the judgments below must be reversed, and the motion denied. It will not do, however, to stop here, as evidently the plaintiff is unable to prove a cause of action without the assistance of the benefits of the federal statute. Act of June 5, 1920; 41 Stat. 1007, c. 250, § 33, which also appears in 3 Mason's United States Code Ann. of 1926, title 46, c. 18, § 688, and known as section 33 of the Jones Act (46 USCA § 688).

As the deceased was working on a German ship, the Appellate Division has held that he is to be deemed a German seaman, and that the act is intended solely for the benefit of American seamen. Although agreeing with that court that the act was intended solely for the benefit of American seamen, I cannot agree that the deceased was in any sense a part of the crew of the Hannover, and thus a German seaman.

Section 33 of chapter 250 of the Act of June 5, 1920, reads as follows:

> "Recovery for Injury to or Death of Seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal repre-

> sentative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 8153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007.)" 46 USCA § 688.

The appellant insists that "every seaman" includes every articled seaman of foreign ships entering our territorial waters; that this act applies to all foreign ships and their crews. He refers to the cases of Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607, and Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306. As stated in the opinion below, when Congress intended to apply the shipping act to foreign ships, it so stated. This was the basis of the Dillon decision. Section 31 of the act of 1920 (section 597 of Mason's Code), "Payment at ports," provided:

> "That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

Section 33 makes no such application, and it is natural to assume, therefore, that Congress did not intend to extend its provisions to foreign ships. The object of the act was to provide for the promotion and mainte-

nance of the American Merchant Marine (Panama R. Co. v. Johnson, 264 U. S. 375, page 389, 44 S. Ct. 391, 68 L. Ed. 748), and I fail to see how the American Merchant Marine would be benefited by applying the act to the crews of foreign ships. Stewart v. Pacific Steam Navigation Co. (D. C.) 3 F. (2d) 329, did not directly decide this point. See The Navarino (D. C.) 7 F. (2d) 743.

However, even though the Jones Act does not apply to foreign ships and their crews while in territorial waters, it does not follow that longshoremen now considered to be American seamen are not within the purposes of the act, even when working on ships of other nationalities.

Longshoremen have become a class by themselves. They are connected with the local port, and do the work of loading and unloading of ships of all nationalities entering that port. They are seldom, if ever, employed by the ship or its owners, but are usually in the employ of a boss stevedore. Such was the case here. Resigno was employed by F. Jarka Company, Inc. This was a corporation doing stevedore business. Resigno had no relations whatever with the ship. It did not employ him, and owed him none of the duties arising out of the relationship of master and servant. F. Jarka Company, Inc., was the employer, and owed him the duties imposed by the common law upon masters. For a violation of those duties the shipowners would not be liable. The Auchenarden (D. C.) 100 F. 895; West Indian & P. S. S. Co. v. Weibel, 113 F. 169, 51 C. C. A. 116; Imbrovek v. Hamburg-American Steam Packet Co. (D. C.) 190 F. 229; Dobrin v. Mallory S. S. Co. (D. C.) 298 F. 349, 352. The longshoreman thus employed by a stevedore may work on

many ships in the course of a day. Would he change his nationality every time to that of the ship on which he happened to be working? Such a statement strikes us at once as unreasonable. In fact he is not a seaman, but merely classed as such to come within the benefits of the Jones Act. Resigno was a resident of New Jersey, worked in New Jersey, and was employed by a domestic corporation doing stevedoring work. He never formed or became part of the crew of any ship, nor was he at the time in question employed by the ship or its owners. That he was classed as a seaman was due entirely to the intention of Congress as read into this provision of section 33, passed for the purpose of advancing the interests of the Merchant Marine, and to benefit American seamen. His work was so closely connected with shipping, and became so necessary to the loading and unloading of vessels, that an act passed in the interests of American seamen could hardly have been intended to exclude him. This is the ruling in the Haverty Case. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. When Mr. Justice Holmes writes: "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible," this is merely the justice's stylistic way of saying that the Act of June 5, 1920, was intended to include longshoremen among the class to be benefited by the act. The work of longshoremen was described in Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 62, 34 S. Ct. 733, 735, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, as follows:

> "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special

> skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'"

This class of specialized workers connected with maritime service is to be covered by the act of 1920 and included within its provisions; not merely those few members of the class who happen for the time being to be working upon American ships. Stevedores and longshoremen would receive very little benefit from this act of Congress were it so limited. Unless the act has this general application, a shift of a gang of longshoremen from a ship on one side of a dock to a ship on the other side might also shift the law of responsibility. Did Congress intend to make the law of responsibility for this *class* of workmen, or did it intend to leave it to these toilers by hand to select that law? The question must answer itself.

This application of the act of June 5, 1920, has been made in Zarowitch v. F. Jarka Co. (D. C.) 21 F. (2d) 187, where Judge Sheppard said:

> "There was no privity between the ship and plaintiff, who was merely a harbor worker, in the service at the time of the Jarka Company, and it would seem a far cry, in view of these facts, to classify the plaintiff as a foreign seaman. The provisions of the Jones (Merchant Marine) Act, extending the rights and remedies applicable to seamen to stevedores, did not invest the latter with the character of seamen, but the statutes by judicial interpretation have been held to include marine workers, and the mere incident of the locus in quo of the work performed, though the test of

> admiralty jurisdiction in tort, does not change the status of such employee from stevedore to seaman."

This was followed by Judge Moscowitz in Mahoney v. International Elevating Co., 23 F. (2d) 130, in the District Court for the Eastern District of New York, November, 1927 (not yet reported), and by the Appellate Division, Second Department, in Muti v. Hoey, decided November 4, 1927, and reported in 221 App. Div. 688, 224 N. Y. S. 662. In Clark v. Montezuma Transportation Co., 217 App. Div. 172, 216 N. Y. S. 295, upon which so much stress is made, the plaintiff was part of the ship's crew, and was employed by the ship. He ceased for the time being to be an American seaman. See, also, the reasoning in Rainey v. New York & P. S. S. Co. (C. C. A.) 216 F. 449, L. R. A. 1916A, 1149.

In behalf of the respondent, the suggestion has been made that we are forced to narrow the application of this act to longshoremen working on American vessels, by reason of the section of the law relating to merchant seamen containing definitions, schedule, and tables found in section 713 of chapter 18, title 46, volume 3, Mason's United States Code Ann. 1926, p. 3279. It reads as follows:

> "Definitions, Schedule, and Tables.—In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be

deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

I do not read this section as containing any such limitation. The purpose was expansion, not limitation. It intended to include in the word "seamen" all those working on board an American ship who might not ordinarily be classed as seamen, such, for illustration, as an orchestra owner. The Sea Lark (D. C.) 14 F. (2d) 201, and employments there cited. It did not, however, necessarily exclude, or intend to exclude, all others from being American seamen. A sailor salvaging a foreign ship in domestic waters would not cease to be, I take it, when aboard such ship, an American seaman entitled to the benefits of the act. A longshoreman, now classed as an American seaman, does not lose the benefits of this act because he happens to be working for a few hours upon a German, instead of an American, ship. The act was for the benefit of the seamen, not solely for the benefit of the ship or the shipowners.

This Act of June 5, 1920, about which we are writing, section 33, gives to the personal representative of any seaman whose death has been caused by a personal injury an action for damages at law, with the right of trial by jury. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides, or in which his particular office is located.

That such provisions did not exclude the jurisdiction of the Supreme Court of this state in a proper case, see Patrone v. Howlett, Inc., 237 N. Y. 394, 143 N. E. 232.

If the above reasons be sound, it follows that the judgments below should be reversed, and the motion for judgment on the pleading be denied, with costs in all courts.

POUND, ANDREWS, LEHMAN, KELLOGG and O'BRIEN, *JJ.*, concur with CARDOZO, *C. J.*

CRANE, *J.*, concurs in result in separate opinion.

Judgments reversed, etc.